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Law Teachers and the Educational Continuum

Abstract

There are many difficulties in teaching the law. These problems are often referred to generically as the difficulty in training students to "think like lawyers." The primary focus of the literature discussing these concerns has, therefore, been on how law schools should assist students in developing this ability. Underlying much of this literature is the assumption that what is needed is some tinkering with the law school curriculum. Students are believed to enter law with a set of abilities and potentialities that are honed by the law school curriculum to produce something called a lawyer or the skill denominated as thinking like a lawyer. If this is not happening then the curriculum needs to be adjusted. This article explores these difficulties and possible solutions.

Keywords

Law school, education, teaching, professors, academia

Disciplines

Legal Education

LAW TEACHERS AND THE EDUCATIONAL CONTINUUM

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I. INTRODUCTION

A. A PRACTITIONER'S EXPOSURE TO HOW STUDENTS THINK

Since a basic premise of this Article is that we are a combination of what we experience and how we are trained to reflect upon those experiences, it seems appropriate to begin on a personal note. Seven years ago I left the practice of law to become a law school professor. By prevailing standards, the length of my time in practice made me a bit "long in the tooth."¹ Like most practicing lawyers who wish to enter the academy, I wanted to pursue abstract scholarly interests and be relieved of the burden of focusing on the narrow concerns of clients.²

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1. A recent study of law school professors ascertained the average number of years of practice experience professors had prior to pursuing a career in teaching. See Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191 (1991). There has been an increase in the number of years of practice experience a professor has before entering the academy. However, the amount of experience is not substantial. The average number of years of practice experience for professors included in the sample was 4.3 years. In addition, the tendency was for the number of years of practice to be lower in more prestigious law schools. See *id.* at 217-19. Thus, my eight and one-half years of practice placed me well over the average.

2. Law schools are a "law professor's dream." See Norman Redlich, *Clinical Education: Stranger in an Elitist Club*, 31 J. LEGAL EDUC. 201 (1981). "It enables the law professor to concentrate on broad issues free from the mundane lawyering problems which perhaps stimulated the move from the law firm to the classroom. It enables the teacher to spend a great deal of time, if he or she wishes, on writing, consulting, serving on government commissions, testifying before committees, and many other ego-building activities. To say that one is a lawyer and a professor, to get the benefits of both and to avoid the drudgeries of both, is a very attractive combination." *Id.* at 204. Moreover, a law school's prestige is partially dependent upon the degree to which its faculty vigorously pursues these benefits and avoids the drudgeries. Publishing articles in prestigious law journals and serving on government commissions enhances the status of the law school, but does not necessarily add to the intellectual enrichment of the students. See W. SCOTT VAN ALSTYNE JR. ET AL., *THE GOALS AND MISSIONS OF LAW SCHOOLS* 5-11 (1990).

However, I was not totally unaware of the challenges posed by the law school environment. I recalled my law school days—daze—and how the Socratic dialogue seemed to be little more than lectures on what was in the casebook, interspersed with questions that suggested the correct answer.³ There were also the courses in which one week into the semester the students were scurrying about in search of commercial outlines or nutshells because the professor was too theoretical and was not providing hard core doctrinal analysis. Hard core analysis denoted the extent to which the professor, at the end of the class period, would provide a summary of what the issues were and the specific rules or tests used to resolve the issues.

Along the way I met others who abandoned practice in favor of teaching. They were very candid in disclosing the joys and sorrows of teaching. Part of the sorrow involved teaching students who had what was described as significant “writing and thinking problems.” These disclosures suggested that there were a number of students who would have spent their time more productively by enrolling in a remedial writing and reading program, rather than attending law school. Finally, there was what was referred to as the end of the semester popularity contest known as “student evaluations.” Some very good teachers were very popular with students and were granted tenure. Some very good teachers were very unpopular with students and were not granted tenure.

These admonitions were a bit daunting, but not for the obvious reasons. It was not necessarily the ardor with which these opinions were expressed that gave me pause. What troubled me was how some of the comments resonated with the experiences I was having in practice with law students. These students were in their final year or semester of law school and were studying for the bar exam and/or seeking employment. Many of them were very anxious to gain courtroom experience. A routine, less glamorous assignment such as legal research, was not exactly what they thought their law school tuition had purchased. Though a problem, it was not an insuperable one. Most of them were willing to do this type of “grunt work” if they saw an experienced “real attorney” doing the same or similar types of

3. Instead of being a partnership in learning where the students and teacher discuss problems to stimulate and enhance each other's intellectual growth, the Socratic method, as practiced, is largely a series of mini-lectures. New ideas are not generated by class discussion and class time is largely a recapitulation of the material in the casebook. See Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 312-13 (1989).

work. So, if an attorney with about three years of experience was still digging through the library stacks or a case file and not in litigation, they tended to think that perhaps this was actually a part of practicing law and there might even be some value in doing it.⁴

Unfortunately, another obstacle frequently presented itself and this one was a bit more intractable. Students seemed to approach cases with a set of stock answers which they assumed would address most, if not all, issues presented in the case. This was a "cookie cutter" approach to legal analysis. Essentially, the case was viewed as a lifeless mass ("dough") that could—should—be forced into previously acquired knowledge molds that imposed a limited set of forms on the case. The mold literally made the case. If the issues could not be forced into the mold then there was something wrong with the client, facts, law or whatever. Certainly it was not the mold. Knowledge of the molds and the ability to force the dough into the mold was viewed by the student as persuasive evidence that he was thinking like a lawyer.

In working with these students the initial difficulty was in convincing them that "the case" was more a concept than an object. What was present, among other things, was an assortment of actions, experiences, emotions and expectations collected in something called a case file. Depending upon the questions asked and how the student combined or recombined and interpreted the array, the case would

4. It is ironic that law students should have a distorted view of what to expect in law practice. Unfortunately, this is not a unique phenomenon. There are at least two factors that help explain the problem. First, law schools are victims of student consumerism. Students demand a particular type or style of training which may or may not develop the skills needed to meet the demands that await them as practicing professionals. See *infra* part III. Moreover, as consumers students are as vulnerable as any other group to inaccurate popular images of law practice. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* ix-x (1991). The expectations of students are shaped by the same process that drives consumerism outside of education. The practice of law, like soft drinks, mouthwash and automobiles, will be all things to all people. Law practice is seen as a means for satisfying unlimited and insatiable desires. Little if any attention is directed to assessing the appropriateness of the desires, the cost to be paid for satisfying them, and the consequences of using the profession as the means to this particular end. *Id.* at 15-18. See generally STUART EWEN, *CAPTAINS OF CONSCIOUSNESS* (1976); MARC GERZON, *A CHILDHOOD FOR EVERY CHILD: THE POLITICS OF PARENTHOOD* (1973).

A second factor contributing to students' distorted view of law practice is the law school prestige hierarchy. Prestige is accorded to law schools whose teachers focus on legal scholarship rather than preparing students for practice. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991). As a result, students tend to graduate from law school with little or no exposure to or knowledge of practice.

also change. Their job was to hew out of that mass of material a form which was cognizable as a legal issue.

A student's static view of the case also affected his legal research. Prior to initiating their research, students frequently presented me with a pressing question concerning the issue because "they wanted to be sure they got started in the right direction." This seemed like a fair request so the question was answered. However, this would be followed, shortly thereafter, by yet another question to clarify exactly what was meant by the first answer. Then a follow-up question requiring elaboration on the two previous answers, and on, and on, and on After a while it became clear that the operating premise of the student was that I really knew the "right answer" and the assignment was nothing more than a test to determine if he could find the answer in as few steps as possible.

This process bore a striking resemblance to a popular television game show, "Wheel Of Fortune."⁵ Like the contestant, the student could win the game by determining what the right answer was, with as little assistance or prompting as possible. Presumably the prize was recognition that he was "thinking like," or "acting like," a lawyer by quickly discovering the correct answer. This approach placed the student in an alarmingly passive role. Rather than being actively engaged in the process of persistent independent questioning and reflection, he was more a passive receptacle waiting to be filled with a correct answer.⁶ These students were applying the Socratic method—as it was actually practiced in law school—to their first significant exposure to practice. Questions merely set the stage for the delivery

5. The rules of the game are fairly simple. Contestants are placed before a board containing blank spots that represent the words of a popular phrase. The contestants can see how many words are in the phrase and how many letters are in each word. Each contestant has the opportunity to guess at what the complete phrase is or letters that are in words of the phrase. For every letter that is correctly determined, the contestant can earn money from a money wheel. The winning contestant is the first one who determines the complete phrase.

6. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 53 (1970). Thinking like a lawyer in this context would merely reflect the ability of a student to sit patiently, record correct answers fed to him by a knowledgeable teacher then repeat the answer in a slightly different context. As Freire noted, this is a static view of knowledge and reality. Instead of an active search for meaning and interpreting and re-interpreting experiences, thinking is reduced to recalling someone else's thoughts and feelings which are viewed as more significant than one's own. See *id.* at 53-54. See also Alice K. Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 N.Y.U. REV. L. & SOC. CHANGE 101 (1991-92) (not all students think the same way and law schools fail to recognize that a student's development as a lawyer and legal thinking will be shaped by his identity, background and experiences).

of a stock answer by the interlocutor.⁷ On one occasion I abruptly terminated the questioning sequence by asserting that I neither knew the right question nor the right answer. The student did not believe me!

And yes, the existence of writing difficulties among students was also confirmed. The primary problem was—well I am not exactly sure what the difficulty was, but there was indeed a problem. Perhaps it is best to simply list my observations. The writing was elliptical. From line to line, paragraph to paragraph and idea to idea, there was frequently something missing which would have completed the line, paragraph or idea. It was as if the student assumed the reader could fill in the blanks and bridge the gaps left where sentences and ideas were not connected with sufficient logical and grammatical glue.

Of course, filling in the blanks is possible if it were readily apparent what the student was thinking or there was a consensus on what the conclusion ought to be. Neither of these circumstances existed; if they had, the assignment would have been a waste of time. It was equally clear that the problem was not caused by the students' failure to invest sufficient time in researching the topic and developing the written material through successive drafts. Effort was invested in the project. It appeared that they were having difficulty in logically connecting bits of information into coherent sentences and paragraphs that demonstrated an ordered, step by step, progression toward a reasoned conclusion.

As an alternative, I asked some students to simply tell me what their research disclosed, that is, verbally analyze the material, step by step, to a conclusion. Perhaps they could do verbally what could not be accomplished on paper. Unfortunately this met with little success. Concepts would be placed in close proximity to each other but the student did not actually explain the logical connection between the ideas. In short, the students did not understand⁸ the material. And,

7. See *supra* note 3.

8. The term understanding is commonly used to describe a wide variety of situations that can involve comprehension of material or simply the ability to memorize and repeat information and instructions. As used in this Article, the term understanding denotes a set of specific skills and intellectual attributes. Understanding means "a sufficient grasp of concepts, principles, or skills so that one can bring them to bear on new problems and situations, deciding in which ways one's present competencies can suffice and in which ways one may require new skills or knowledge." HOWARD GARDNER, *THE UNSCHOOLED MIND: HOW CHILDREN THINK AND HOW SCHOOLS SHOULD TEACH* 18 (1991) [hereinafter GARDNER, *UNSCHOOLED MIND*]. Moreover, "[a]n important symptom of an emerging understanding is the capacity to represent a problem in a number of different ways and to approach its solution from varied vantage points; a single,

here is where the "cookie cutter" approach to legal analysis resurfaced. Concepts from the same substantive area of law were strung together seemingly based upon the assumption that they must be related because they were from the same or closely related substantive area. Somewhere in the maze of concepts enumerated the correct answer must lie trapped within the knowledge molds created by stringing together similar sounding concepts.

B. A FLEDGLING'S EXPOSURE TO HOW STUDENTS THINK

Notwithstanding my experiences as a practitioner, I entered the academy. After all, at the time of these events I was a mere practicing attorney who happened to have worked with a handful of students. Certainly these were isolated occurrences. It is tempting at this point to baldly assert that these experiences were replicated in law school; the "cookie cutter" and the "Wheel Of Fortune" are flourishing in academe. Unfortunately, the problem looms larger than that of a law school or law student issue which can be analyzed in isolation from other social forces, and reduced to definitive questions and answers. Reducing the question to manageable size by calling it, for example, a law school curriculum problem, is perhaps tantamount to searching for a "scholarly cookie cutter" to limit a much larger and unwieldy problem.

Yes, many of the difficulties just recounted are present in law schools. These problems are often referred to generically as the difficulty in training students to "think like lawyers." The primary focus of the literature discussing these concerns has, therefore, been on how law schools should assist students in developing this ability.⁹ Underlying much of this literature is the assumption that what is needed is

rigid representation is unlikely to suffice." *Id.* In my example, the students were not demonstrating an understanding of the material because they lacked the ability to apply the "concepts" and/or "principles" they discovered to new unanticipated problems. *See also* MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* (1973) (describing how adult learning and understanding is focused on problem solving and developing skills and knowledge necessary to address issues unresolved by their current skills and knowledge); SHARAN B. MERRIAM & ROSEMARY S. CAFFARELLA, *LEARNING IN ADULTHOOD: A COMPREHENSIVE GUIDE* (1991) (survey of various theories concerning how adults learn both in and outside of formal educational settings).

9. *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* (1992) [hereinafter *MACCRATE REPORT*]; HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972); ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW* (1921); ALFRED SMITH, *COGNITIVE STYLES IN LAW SCHOOLS* (1979); Van Alstyne et al., *supra* note 2; FRANCES KAHN ZEMANS & VICTOR G.

some tinkering with the law school curriculum. Students are believed to enter law with a set of abilities and potentialities that are honed by the law school curriculum to produce something called a lawyer or the skill denominated as thinking like a lawyer. If this is not happening then the curriculum needs to be adjusted.

Some of the literature, however, attempts to formulate alternative views of what lawyers do, how they think and, therefore, the reforms law schools must institute to train students for this new vision of the practice of law.¹⁰ Unfortunately, what has been lost in most of these discussions is the recognition that law schools do not exist in an educational vacuum. Most entering law students have received at least sixteen years of schooling prior to entering law school. The relationship between what students are taught prior to law school and how this affects what law professors attempt to accomplish, is rarely if ever examined.

With the publication of the MacCrate Report¹¹ law school curricula are once again the subject of debate. However, the Report, with its emphasis on enumerating a check list of skills and values that students ought to develop in law school, is not the first time this issue was seriously addressed. Lawyer competence, and the role of law schools in developing that competence, was previously scrutinized by the American Bar Association.¹² Moreover, the Report shares with most of the literature in the area the same narrow perspective on law school students. There is little, if any, awareness of the possibility that an

ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993); Anthony D'Amato, *The Decline and Fall of Law School Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987); Edwards, *supra* note 4; Johnson, *supra* note 4; Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. (1986); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597 (1981).

10. Dueker, *supra* note 6; John S. Elson, *The Case Against Legal Scholarship Or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989); A.J. Goldsmith, *An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education*, 43 J. LEGAL EDUC. 415 (1993); Lopez, *supra* note 3; John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275 (1989); John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 35 J. LEGAL EDUC. 189 (1986); Redlich, *supra* note 2; Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992).

11. See MACCRATE REPORT, *supra* note 9.

12. See SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

index of skills and values may be limited by the prior educational training of students. Law schools are now educating the post baby-boom generation of lawyers. Attempting to reform law school curricula without some reflection on what the post baby-boom primary, secondary and post-secondary educational system is doing is at best short-sighted.

It is equally important to realize that law professors do more than teach students. Some of the obligations facing professors represent the fall-out from the drive to place law schools within the walls of universities. While this effort has been attributed to many factors¹³ one thing is clear. Prestige inside the academy is frequently accorded on the basis of one's research, not one's teaching.¹⁴ Given this fact, a significant question which should be examined is: what are the consequences of law schools finding a home in the modern research university?

This question assumes additional significance given the view that law schools are training students for a profession which considers itself to be more than a means to enhance the private financial gain of its members. As Alfred Reed noted many years ago, lawyers are in a public profession. "They are part of the governing mechanism of the

13. Jerold Auerbach, for example, argues that the legal profession and law schools should not be seen as institutions driven by the value free dictates of pure reason. They are institutions shaped by the ideological and political objectives of powerful groups in society. Thus, the drive to place law schools in universities served political and social objectives and was not mandated by any purely rational or pedagogical reason. *See generally*, JEROLD S. AUERBACH, *UNEQUAL JUSTICE LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). William Johnson, however, does not see the development of legal education as being attributable to a single predominant factor such as political ideology. Placing legal education in universities was not the product of a systematic discussion of how to teach legal techniques, but was the result of piecemeal adjustments to changing academic and professional concerns. One of these concerns was a recognition by law professors that higher education in America was growing in prestige and law schools could share in this status by being associated with universities. *See generally*, WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY* (1978) [hereinafter JOHNSON, *SCHOOLED LAWYERS*]. *See also* ROBERT STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983); Chase, *supra* note 9.

14. *See, e.g.*, Edwards, *supra* note 4 (professors at elite law schools are accorded prestige based upon the production of legal scholarship that is of little value to judges and the practicing bar); Elson, *supra* note 10 (the scholarly mission and model of law school ignores and limits the ability of law schools to train competent lawyers); VAN ALSTYNE ET AL., *supra* note 2 (a law school's image is based, in part, upon the scholarship of the faculty and not whether the curriculum is structured to produce competent professionals).

state. Their function is in a broad sense political."¹⁵ Moreover, "private individuals cannot secure justice without the aid of a special professional order to represent and to advise them."¹⁶

Another factor which certainly contributes to the view that lawyers are part of a public profession is the substantial overrepresentation of lawyers among elected and appointed officials.¹⁷ This suggests another way in which lawyers are exercising a heightened level of influence over the public. On an ever escalating scale, issues formerly seen as moral or political are now denominated as legal. Lawyers are not simply "gatekeepers" in the sense that they provide access to justice. They are shaping the contours of social debate over issues that were previously considered outside of their domain and subject to resolution through private dialogue or other means of social control. Lawyers are defining the parameters of the debate rather than merely controlling access to and regulating formal means of dispute resolution.¹⁸

15. REED, *supra* note 9, at 3.

16. *Id.*

17. See ZEMANS & ROSENBLUM, *supra* note 9, at 1 (In 1978, 69.6% of U.S. senators and 52.2% of U.S. representatives gave their occupation as "lawyer.").

18. This is not meant to suggest that lawyers are consciously attempting to influence public thinking on social issues. The process is more indirect. One example of this influence, and how it operates, is in the degree to which social problems are defined as a clash between absolute rights or entitlements possessed by individuals. Rights are defined in a narrow legal and absolute sense. As a result, emphasis is placed upon resort to litigation rather than compromise and dialogue. In reality the conflict represents the need to make choices between equally valid ends or desires. The solution, therefore, lies in understanding, debate, and compromise, rather than insistence upon absolute privileges or rights. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter GLENDON, *RIGHTS TALK*]; see also CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* (1992) (Americans see themselves as a society of victims who are entitled to certain privileges and rights as compensation for their victimization). However, even though many are quick to enumerate their rights, the possession of a right does not necessarily produce determinant consequences. A right is an abstraction and has meaning only when it is exercised in a specific social context. Thus, in asserting a right, one cannot know in the abstract exactly what the right is without specifying the social/cultural context in which the right is exercised. A right is, therefore, another way of articulating a particular set of social prerogatives and duties grounded in a specific society. It is not, as commonly conceived, a statement of a transcendental principle or course of conduct which is appropriate under any and all circumstances and social settings. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1375 (1984).

An example of the rights phenomenon in action, and how it plays a role in shaping the parameters of social debate, can be seen in the issue of the constitutionality of juvenile curfew ordinances. Courts are struggling with the issue of whether juveniles have a constitutionally protected liberty interest, tantamount to that of adults, which affords juveniles the right to be abroad at night. While the issue is defined as a question involving "juvenile rights," the legal analysis is not based upon transcendent legal principles. The analysis implicitly articulates then endorses a particular political and cultural consensus regarding the nature of the family and its

Thinking like a lawyer, given the changing demands made upon the legal profession, means more than the ability to analyze precedent and spot issues. It means addressing public concerns that may or may not be subject to resolution in the legal system. Thinking in this context is not necessarily a cognitive process governed by certain logical rules, as much as it is the ability to facilitate informed public discussion of issues that illuminate competing values, interests and choices.¹⁹

This vision of the public profession places it outside of the traditional definition of a profession which focused on mastery of specialized knowledge and providing limited services. Indeed, professionalism is normally associated with a reduction in the ability and desire to foster public debate and searching inquiry into issues of interests to the general public.²⁰ The alternative expanded public view of the profession casts the lawyer in the role of public intellectual²¹ rather than professional. If this is what is meant when reference is now made to the public professional and if the reference necessarily implies certain ways of thinking, then we ought to ask whether this view of thinking and the profession is compatible with the setting in

relationship with the state. However, when courts and advocates insist upon viewing the issue as one involving juvenile legal rights, the larger social question concerning changes occurring within families and society is not explicitly addressed and analyzed. See Michael Jordan, *From the Constitutionality of Juvenile Curfew Ordinances to a Children's Agenda for the 1990s: Is it Really a Simple Matter of Supporting Family Values and Recognizing Fundamental Rights?* 5 ST. THOMAS L. REV. 389 (1993).

19. See generally GLENDON, RIGHTS TALK, *supra* note 18, at chs. 1 & 7.

20. See RUSSELL JACOBY, THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME 147 (1987); CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 385-90 (1979); GERZON, *supra* note 4, at 164-77. But see John E. Sexton, *The Preconditions of Professionalism: Legal Education for the Twenty-First Century*, 52 MONT. L. REV. 331 (1991) (lawyers have helped shape the nation's values and bear a special responsibility to act as society's conscience); Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403 (1992) (law is the last remaining cultural phenomenon that unites society and lawyers are, therefore, important in serving as gatekeepers to and protectors of this form of social cohesion) [hereinafter Terrell & Wildman, *Rethinking "Professionalism"*].

21. Public intellectuals are writers and thinkers who address a general and educated audience concerning social and cultural issues. Their goal is to stimulate an open and informed debate. JACOBY, *supra* note 20, at 5, 221. These intellectuals must be distinguished from academics who may very well stimulate debate over social issues, but the discussion is within academic circles. Moreover, the academic's mode of expression is highly technical and generally incomprehensible to the public. Rather than opening the debate up for broad participation, academics by virtue of their means of expression and audience, limit the participants to others in the academy. *Id.* at 1-8. See also CHARLES J. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION (1988) (academics tend to use "profspeak:" a language that is incomprehensible to the general public and empowers academics by cloaking knowledge behind a veil of inflated and intimidating jargon).

which future lawyers are being trained. Are law schools structured to produce public professional/intellectuals?

These questions go to the heart of what is, will or should be meant when law professors assert that they are training students to think like lawyers. Once again, the answers to these questions are going to be shaped by the type of educational experiences students have prior to entering law school. This Article will explore the unexamined connection between law schools and the world of education outside of the academy. Law schools will not be held up for examination in isolation from the entire educational system, but will be viewed as embedded in and profoundly influenced by the sixteen years of formal education that most students receive before entering law school. The "Wheel of Fortune" approach to legal analysis has roots that sink deeper than law school, though the academy tends to look no further than the law school classroom or LSAT scores for an explanation.

Finally, there is another outside pressure on law schools which will be explored in this Article. The ubiquitous demand for legal solutions to social ills invariably leads to tension between law professors, law schools and the expectations of the public. The public may be demanding services which law schools simply cannot provide, or if they can, it may be at a price that law schools and professors are unwilling to pay. Another question which needs to be examined then is what are the public's expectations and how do they affect the profession, students and law schools?

II. THE INTELLIGENT LAWYER PAST AND PRESENT

To understand how law schools are influenced by the social environment in which they exist, it is necessary to explain how the very mission of law schools—training students to think like lawyers—is a variable concept. A good place to start is by demonstrating that how an intelligent and skilled lawyer defines and solves problems may vary over time. Law schools are not set on a fixed course to inculcate competencies and modes of thinking that remain constant. Once this is understood, law schools and their relationship to society will be seen as equally variable and subject to being influenced by social and educational forces existing outside of law schools.

A. THE GENERIC CONCEPT OF THINKING LIKE A LAWYER

The phrase, "thinking like a lawyer," is assumed to have a fixed meaning because of the way most of us conceive of intelligence. Intelligence is associated with the amount of knowledge acquired through using a particular kind of reasoning.²² There are, however, other more useful definitions of intelligence. A simple alternative would be the ability to solve problems and produce things that are valued in a particular cultural setting.²³ This definition focuses on how intelligence and what we call thinking like a lawyer, are relative terms. How lawyers thought about and defined problems in 1884 is different from

22. This association is based upon a number of assumptions about the relations among mind, language, and the physical world. See MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* 21 (1987) [hereinafter JOHNSON, *THE BODY*]. It is assumed that objects can be and are represented by symbols. These symbols have meaning by virtue of their capacity to accurately represent things, properties, and relations existing objectively in the world, independently of the individual who uses the symbols. Reasoning is, therefore, the rule-governed manipulation of these symbols to represent the proper (objective) relation between symbols and the objects these symbols represent. *Id.* at 22-25. See also DAVID A. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* 99-100 (1984) (there has been a synthesis of the rationalist and empiricist traditions to produce the view that the mind possessed *a priori* equipment that enabled it to interpret experience, that is, equipment to locate forms in time and space and equipment to understand order and conformity).

Thinking like a lawyer is believed to reflect the same kind of relationship between mind and language. When one thinks like a lawyer one is manipulating objective transcendent principles which are reflected in the law. This process is value free and does not serve any particular political or social objective. It is simply a process whereby the social world is organized and meaning is imposed on what would otherwise be an incomprehensible world. See AUERBACH, *supra* note 13, at 11. But see Steven Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) (the construction of meaning is not rooted in abstract principles but develops through human interaction with the world and the culture that develops out of that interaction).

23. See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 10 (1983) [hereinafter GARDNER, *FRAMES OF MIND*]. "[H]uman intellectual competence must entail a set of skills of problem solving-enabling the individual to *resolve genuine problems or difficulties* that he or she encounters and, when appropriate, to create an effective product—and must also entail the potential for *finding or creating problems*—thereby laying the groundwork for the acquisition of new knowledge." *Id.* at 60-61. An intelligence or set of competencies resulting in problem solving and knowledge generation may, therefore, come in different forms. For example, a poet exhibits linguistic intelligence. This involves "[a] sensitivity to the meaning of words, whereby an individual appreciates subtle shades of difference . . ." *Id.* at 77. It may also require "[a] sensitivity to the order among words—the capacity to follow rules of grammar, and, on carefully selected occasions, to violate them . . . a sensitivity to the sounds, rhythms, inflections, and meters of words . . . [a]nd a sensitivity to the different functions of language—its potential to excite, convince, stimulate, convey information, or simply to please." *Id.* Moreover, the existence of one intelligence does not rule out the possibility of other distinct and autonomous intelligences that combine in a multiplicity of ways in an individual or a culture. *Id.* at 8-9.

how this is done in 1994. Equally important, the societal acceptance of these definitions and solutions may also vary.

Given this alternative definition of intelligence, it follows that the type of skills recognized as indicative of intelligent behavior will also vary according to the nature of the problem presented. Certain skills may be very useful in solving current socially significant problems, while during another period these same skills are deemed useless or indicative of ignorance. Thus, thinking like a lawyer may specify a range of skills and/or problem solving abilities that are limited temporally and culturally.²⁴

The world of the mid-nineteenth century circuit lawyer and judge described by William Johnson²⁵ is interesting, not as a nostalgic look at days gone by, but because it suggests several things about what it meant to be a "good lawyer" and supports the idea that intelligence, or thinking like a lawyer, is a variable concept. Johnson suggests that lawyers were prized by their clients, and other lawyers, based upon their skill as orators, not their knowledge of legal precedent or ability

24. This is the most difficult concept for lawyers and the lay public to accept. This is due, in part, to the way lawyers are trained. The case method was and is the primary pedagogical methodology for training lawyers and at its inception represented the attempt by law schools to adopt the empirically and rationally driven inquiry undergirding the natural sciences. See Mudd, *supra* note 10, at 194. As a result, certain competencies which support this mode of inquiry, were emphasized in law school while others were de-emphasized. For example, the ability to array legal authorities into logical systems became a significant measure of a lawyer's competence and intellect. See Anthony Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613-614 (1984). However, the existence of one set of competencies associated with logical thinking does not preclude the existence of and necessity for other valuable skills. The case method tends to emphasize only one type of intelligence: logical-mathematical intelligence. See generally GARDNER, *FRAMES OF MIND*, *supra* note 23, ch.7. Though in practice, highly skilled lawyers possess and exercise other intelligences. ("There is room in . . . the legal profession for the individual who has outstanding linguistic skills: one who can excel in the writing of briefs, the phrasing of convincing arguments, the recall of facts from hundreds of cases . . . and [t]here is room also for the individual with highly developed interpersonal skills: one who can speak eloquently in the courtroom, skillfully interview witnesses and prospective jurors, and display an engaging personality, the so-called society lawyer. Finally, there is room for the individual with highly developed logical skills: one who is able to analyze a situation, to isolate its underlying factors, to follow a torturous chain of reasoning to its ultimate conclusion." *Id.* at 317).

The term thinking like a lawyer is, therefore, frequently used to denote a particular kind of intelligence, but it is better understood as a generic concept. It does not necessarily denote any permanent and specific set of abilities. At any given time one intelligence or skill may be de-emphasized, yet it is still included within the set of skills actually used by practicing lawyers. The limited narrow definition of thinking like a lawyer appears to be more a function of the method used in training lawyers rather than the skills actually used by practicing lawyers. See Mudd, *supra* note 10, at 192-93.

25. See JOHNSON, *SCHOOLED LAWYERS*, *supra* note 13, at ch. 2.

to manipulate abstract legal concepts. For the nineteenth century jurist, being an intelligent lawyer meant placing oneself in a web of relationships involving the community, fellow lawyers and judges.²⁶ Today's jurists, who attempt to understand that period in the legal profession, are easily led astray in evaluating the skills and quality of the services delivered by practitioners. This misapprehension is caused by the relatively informal social organization of the circuit and the absence of explicit admission standards. Informality is equated with an absence of standards by which to control and assess the performance of lawyers.²⁷ What existed, however, was another means for formulating and imposing standards. Correct or skilled behavior was learned and exhibited through interlocking professional and social interaction, rather than adherence to rigid codified standards of performance.²⁸

During this period, other types of intelligence were valued, if not in lieu of, then certainly in addition to what we now associate with thinking like a lawyer. The interlocking social and professional associations combined with an emphasis upon oratory skills, suggest that a premium was placed upon linguistic and/or personal intelligence.²⁹ A skillful lawyer in this environment was not necessarily one armed with the ability to memorize and recite precedent or distinguish

26. *Id.* at 28-29.

27. *Id.* at 25-26.

28. Terrell and Wildman refer to this type of organization as a club.

The basic efficiency-enhancing feature that clubs can provide is predictability. In situations of great uncertainty—where social circumstances are in flux or the nature and quality of a product are not readily apparent—individuals with similar interests may organize to provide each other with consistent, comprehensible feedback, and to provide outsiders with a standard against which the members of the club might be assessed. The essential function of the group, consequently, is informational. Membership tells members something about each other—it helps them predict the kind of interaction they . . . do not otherwise know well—and it likewise tells non-members something about those in the club. This information can sometimes predict a great deal about how the member will interact with others because the rules of the club are pervasive and fundamental to the member's life, like those of being a Buddhist monk.

Thus, in order to serve this information function, club membership must mean something; but to mean something, clubs must in turn be able to exercise serious control over entry into the group and the behavior of their members.

Terrell & Wildman, *Rethinking Professionalism*, *supra* note 20, at 409-10.

Today the situation is reversed. The Bar no longer represents a relatively homogenous group of men from a similar background, interacting in close association and, therefore, monitoring and controlling each other's behavior. Standards of behavior are now often vague and subject to constant challenge based upon the diversity of experiences of those who comprise the Bar. *See id.* at 411-17.

29. There are four major aspects to linguistic intelligence. First there is the mnemonic potential of language which helps one remember information. Second, language plays a central role in explaining other phenomena. Third, language can also be used to reflect on and understand language itself. Finally, and most relevant here, is the rhetorical aspect of language. The

between highly developed legal principles. Instead, it was the ability to understand, based upon professional and social contact, how a judge viewed or felt about one's case and how these views were likely to influence a judge's ruling on legal issues. Or, perhaps the ability to anticipate what opposing counsel was likely to argue based upon one's knowledge of or ability to recognize the mood, motivation, or temperament of counsel or oneself.³⁰

rhetorical is simply the ability to use language as the means to convince others to engage in a particular course of action. GARDNER, *FRAMES OF MIND*, *supra* note 23, at 78.

Personal intelligence has two components: intrapersonal and interpersonal. Intrapersonal intelligence involves the ability to access one's own feelings. It is the capacity to "instantly . . . effect discriminations among these feelings and, eventually, to label them, to enmesh in symbolic codes, to draw upon them as means of understanding and guiding one's behavior." *Id.* at 239. Interpersonal intelligence involves the "ability to notice and make distinctions among other individuals and, in particular, among their moods, temperaments, motivations, and intentions." *Id.* "In an advanced form, interpersonal knowledge permits a skilled adult to read the intentions and desires—even when these have been hidden—of many other individuals and, potentially, to act upon this knowledge—for example, by influencing a group of disparate individuals to behave along desired lines." *Id.*

30. These abilities mesh with the way members of the Bar were organized and controlled. Members provided information to each other and exercised control over one another through an informal social network. This network was an essential component of a process that shaped how a member viewed his life and place in society. *See supra* note 28. The absence of explicit codified standards does not indicate their nonexistence. Instead, it points to an emphasis upon the use of a different kind of intelligence in ascertaining the standard and understanding one's own feelings about and ability to follow the standard. This involves the use of intrapersonal intelligence. Moreover, determining whether others felt bound by the standard and if bound how they would behave, involves an advanced form of interpersonal intelligence. *See supra* note 29.

This is not to suggest that these skills or intelligences are nonexistent or irrelevant today. A skilled litigator today certainly demonstrates the ability to "read a witness or juror." This is clearly a form of interpersonal intelligence. The point is that this intelligence is a distinct component of the generic concept we call thinking like a lawyer. It is possible that this component was more prevalent or valued at one point in time but has diminished in the degree to which it is viewed as the only or preeminent intelligence or skill denoted by the term thinking like a lawyer. Even though concepts change over time it appears that the phrase "thinking like a lawyer" is believed to have one constant meaning. This may simply be a reflection of how difficult it is to conceive of or remember how the phrase could have meant anything different. While the assumption of an eternally constant meaning for the phrase makes the legal profession more intelligible to us, this understanding is accomplished at the cost of alternative conceptions of how the profession might be or has been structured. *See* PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: THE USES OF FAITH AFTER FREUD* 232 (1966) (culture makes the world more intelligible to us by generating meanings and understandings that are implicitly understood and do not require reflection or conscious commitment to these meanings); *cf.* Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 109 (1984) (the real power of the dominant tradition in legal thinking lies in its persuasive ability to convince people that the way it conceives of the world may not be the only view, but it delineates the only attainable world in which a sane person would want to live).

This was also a time when lawyers were trained by apprenticing.³¹ The existence of this type of training is suggestive of a different view of what thinking like a lawyer meant and the type of skills a successful lawyer possessed. Different intelligences, and skills associated with them, are developed through different forms of training. Apprenticeships emphasize contextualized learning in which "the reasons for the various procedures being taught are generally evident, because the master is in the process of producing goods or services for which there exist an explicit demand and an evident use."³² In this environment, the knowledge transmitted and skills developed are intertwined with the interpersonal aspects of life within the culture. Learning occurs through establishing a personal bond with someone who is recognized and accorded respect within society.³³ Teaching abstract concepts is rejected in favor of inculcating particular skills that are mastered through observation and repetition.³⁴

If the nineteenth century views of thinking like a lawyer, and how lawyers ought to be trained, are compared with the current conception of these ideas, some striking differences emerge. Today's lawyers are trained, almost exclusively, in law schools. The gradual movement from apprenticing to schooling corresponded with a shift in what was emphasized in the new formulation of the concept, thinking like a lawyer. Law school training and lawyerly thinking were defined as a form of scientific inquiry. Students learned, and professors were in search of, universal and abstract legal principles.³⁵

Formal schooling, whether it is primary education, graduate or professional school, is structured to meet the demands of learning abstract principles. Schools at every level in the educational system tend to emphasize decontextualized learning where the subject matter covered cannot be seen, touched or experienced. Students are trained to manipulate abstract concepts and symbols, rather than taught how to acquire particular skills and solve specific problems rooted in their experiences.³⁶ Thus, "law schooling" is directly related to a changed conception of the law. Law students needed to be trained in comprehending and manipulating the principles generated by the new science of law. Students learned to think abstractly rather than contextually,

31. See generally STEVENS, *supra* note 13.

32. GARDNER, UNSCHOOLED MIND, *supra* note 8, at 122.

33. GARDNER, FRAMES OF MIND, *supra* note 23, at 343-44.

34. *Id.*

35. See Chase, *supra* note 9, at 331-43; Schultz, *supra* note 10, at 57-58.

36. GARDNER, FRAMES OF MIND, *supra* note 23, at 357-58.

and this learning process was severed from personal bonds which formerly supported the learning process in apprenticeships.

This type of training and thinking engenders a hierarchical view of how knowledge is created and should be valued.³⁷ At the pinnacle of the hierarchy is the researcher/theoretician. His primary concern is scientific investigation and theoretical systematization of knowledge. Inquiry into how this knowledge is applied to concrete problem situations is not his concern. This knowledge is literally generated in a domain distinct from practice and is now largely associated with law school professors teaching in universities.³⁸ At the other end of the spectrum is the practitioner who indirectly relies upon the theoretical knowledge generated by professor/scientists to form the basis for resolving the problems of clients.³⁹ Only certain forms of thought employed in the university setting are considered scientific. The search for abstract legal principles in cases was a scientific process, while what occurred in a practitioner's office was not.⁴⁰

For the mid-nineteenth century lawyer, this conception of law practice and legal knowledge was distinctly different from the world of apprenticing and legal practice. He was enmeshed in a web of professional and personal relationships in which legal problems and knowledge tended to present themselves in concrete situations. Issues were discussed and refined not necessarily in a law library, but in watching, interacting with and learning from fellow practitioners in the context of life on the judicial circuit. One knew how to think because one learned the process by associating with others working their way through similar problems. Now, one learns how to think by mastering

37. David Schon argues that this hierarchical view of knowledge is part of the model of technical rationality that has shaped ideas about the professions. This model views professional activity as "instrumental problem solving made rigorous by the application of scientific theory to technique." DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER HOW PROFESSIONALS THINK IN ACTION* 21 (1983) [hereinafter SCHON, *REFLECTIVE PRACTITIONER*]. Professions operate on the assumption that there are agreed upon ends which the profession must pursue and a scientific knowledge base which is used to achieve the previously specified ends. The knowledge base has four essential properties. "It is specialized, firmly bounded, scientific, and standardized." *Id.* at 23. It is in the process of applying the knowledge base to problem solving that the hierarchical view of knowledge is generated. *Id.* at 24.

38. See *id.* at 24-27. See also Edwards, *supra* note 4, at 45-47 (too many law school scholars engage in impractical scholarship which fails to address issues faced by practitioners).

39. See SCHON, *REFLECTIVE PRACTITIONER*, *supra* note 37, at 26-30.

40. See McManis, *supra* note 9, at 644-48 (legal education in the nineteenth century was influenced by the general trend in higher education toward the adoption of a scientific model of research as the mission of centers of higher learning).

the ability to manipulate abstract concepts in an environment far removed from where the skills will eventually be exercised.

Although it is impossible to resurrect a nineteenth century lawyer to verify how he thought, what skills he valued and how he learned them, we can still obtain a glimpse of the schism that divides current and past conceptions of how lawyers think. Oddly enough, that insight is provided by how current practitioners view the legal profession as being stratified according to the prestige associated with a practice specialty.⁴¹ Low prestige practice specialties frequently involve the use of interpersonal skills while high prestige specialties are associated with abstract analytical skills.⁴² Effective interpersonal skills roughly correspond with inter/intra-personal intelligence⁴³ while analytical skills involve logical-mathematical intelligence.⁴⁴ Moreover, the skills associated with a specialty also mark the boundary dividing schooling, with its decontextualized learning, from a contextualized apprenticeship approach to learning. Practitioners believe analytical skills are an appropriate subject for law school instruction while interpersonal skills must be learned outside of law school.⁴⁵

The existence of a prestige hierarchy reflects the shift in the dominant view of how lawyers think and the skills necessary to render

41. See ZEMANS & ROSENBLUM, *supra* note 9, at 92-93.

42. The four skills seen as important by the largest number of practitioners were: fact gathering, capacity to marshal facts and order them so that concepts can be applied, instilling others' confidence in you, and effective oral expression. *Id.* at 126-28. Zemans and Rosenblum note how these skills, while important to lawyers, are not peculiar to the practice of law. *Id.* It was not until the skills ranked fifth, sixth and seventh were reached that skills and knowledge, associated with the legal profession, were identified by practitioners as important. These skills are: ability to understand and interpret opinions, regulations and statutes; knowledge of substantive law; and legal research. *Id.* at 125-26. The most surprising finding was that the skills popularly associated with lawyers—brief and opinion writing—were rated quite low in importance. Only 19.8% of the lawyers surveyed believed that brief writing was extremely important while 13.5% believed opinion writing to be extremely important. *Id.* at 126.

The skills could be viewed as falling into two categories: analytical and interpersonal skills. Examples of analytical skills include: knowledge of substantive law; the ability to synthesize law; legal research; and the ability to understand and interpret opinions, regulations, and statutes. Interpersonal skills would include: getting along with other lawyers, instilling others' confidence in you, effective oral expression, and interviewing. *Id.* at 126-27. Practicing lawyers tended to select analytical skills as being crucial in higher prestige areas of practice, while interpersonal skills were frequently associated with low prestige practice specialties. *Id.* at 131-32. High prestige practice specialties included: securities, tax, antitrust, patent, and banking. Low prestige specialties were: criminal, family, personal injury, and poverty. *Id.* at 93, note 4.

43. See *supra* notes 29 and 42.

44. See *supra* notes 24 and 42.

45. The skills identified as being essentially analytical in nature were skills learned in law school. Interpersonal skills, however, were developed through practice experience. See ZEMANS & ROSENBLUM, *supra* note 9, at 135-38.

competent service. What were once assumed to be indispensable skills for a lawyer to possess are still present and considered part of the generic concept of lawyerly thinking, but they are accorded less prestige. In effect, these skills were moved to the periphery of importance. Skills which can be learned by individuals in other professions or outside of the formal schooling process exist and are used. However, they are devalued and do not occupy a prominent place in defining how a lawyer thinks and manifests this thought process by exercising specified skills in particular ways.⁴⁶

III. THE SCHOOLING CONTINUUM

The previous section demonstrates that the term thinking like a lawyer masks many assumptions about what intelligence is and how intellect is developed. Intelligence is capable of alternative formulations or shifts in meaning and the legal profession experienced such a change. This was, however, hidden from view by the continuous use of the phrase "thinking like a lawyer." Now that these assumptions have been exposed it is necessary to search for additional tacit assumptions that undergird the current view of what thinking like a lawyer means and requires. If as previously discussed, the term tends to obscure more than it illuminates, then an explicit examination of these assumptions will give us purchase on why students currently have difficulty thinking the way we now believe they ought to think.

A. WHAT WE ASSUME ALL SCHOOLS ARE DOING

Law schools operate on the premise that entering students have successfully passed through the schooling process and are ready to apply previously developed analytical abilities to the study of law. The transition ought to be smooth since students are presumably trained from an early age to develop the kind of logical/analytical thinking process employed in law school. This process "involves analyzing experience, reasoning reflectively, using formal logic, and assimilating, storing, and recalling information."⁴⁷ Law school applicants are, therefore, believed to have a highly developed ability to

46. See *supra* note 42; Lopez, *supra* note 3, at 356 (acknowledging that lawyering requires practical know-how comes close to admitting that thinking like a lawyer is not discontinuous from everyday problem solving and similar to the work of other less-privileged professions).

47. JANE M. HEALY, *ENDANGERED MINDS: WHY CHILDREN DON'T THINK AND WHAT WE CAN DO ABOUT IT* 247 (1990).

comprehend and experience the world abstractly and analytically, rather than primarily relying upon first hand experience.

The very structure of the typical law school classroom underscores these assumptions. Law school classrooms are not terribly dissimilar from classrooms in any other school. Learning occurs in an isolated environment and is directed by someone skilled in the subject matter. Tasks are defined and assigned by the expert/teacher who is more interested in developing particular skills and imparting knowledge, than he is in assessing what may be of interest or concern to the student.⁴⁸

Law school professors frequently warn entering students that law school is unlike any of their previous educational experiences. Notwithstanding this admonition, law professors must assume that the law school learning experience is, in some essential respects, a replica of earlier stages in the schooling process. Students are believed to have been drilled in the process of viewing the world as consisting of objects with properties that stand in various relationships to each other, independent of human understanding and will. As a result, there is a rational structure to reality that exists independently of what one may think or feel.⁴⁹

Success in learning must, therefore, be measured by the degree to which one's view of the world accurately reflects the abstract logical relationships between objects and ideas.⁵⁰ However, these higher level analytical abilities are "not automatically built into the brain."⁵¹ They are a product of developing the ability to manipulate language in ways that reflect the abstract relationships between objects and logical categories.⁵² It is this learning process which is presumed to begin the first day of formal schooling. What is then new for the entering law student, is the learning of a new set of abstract relationships that exist

48. See generally GARDNER, *FRAMES OF MIND*, *supra* note 23, at 357-58; GARDNER, *UNSCHOOLED MIND*, *supra* note 8, at 131-32. See also Redlich, *supra* note 2, at 204 ("For [students] law school has been more like college than either we or they care to admit. Although we tell students when they enter law school that they are going to be faced with a totally different experience, it is not that different. A first year law course still consists of a student with a professor at the head of a classroom. The student is still able to achieve success based upon his or her mastery of verbal skills and concepts.").

49. This represents the objectivist view of the world that dominates Western philosophical traditions concerning the structure of the world and human comprehension of the world. See *supra* note 22.

50. See JOHNSON, *THE BODY*, *supra* note 22, at 22-25.

51. HEALY, *supra* note 47, at 106.

52. *Id.* at 106.

in a specific substantive area of abstract inquiry—law. What should not be new and is believed to preexist entry into law school is: extensive exposure to and practice in seeing the world abstractly; developing logical categories to represent this world; and using language to manipulate and explore this world of abstraction.

Given the assumption that the necessary educational foundation was laid prior to law school, a critical question to ask is whether this assumption is justified. Are law professors mistaken in assuming that the “law schooling” process is a replica of earlier stages in the schooling continuum? If they are mistaken then students who progress through law school are not thinking like lawyers because they are not prepared to do so. Furthermore, if they are not prepared to do so, but are still graduating and practicing law, then the meaning of the term “thinking like a lawyer” may be changing—again.

B. ALITERACY K THROUGH COLLEGE

The evidence is mounting that legal education is built upon a foundation that is, if not crumbling, certainly weakened. Critical reading and language skills, two essential skills necessary in the schooling process, are in danger of becoming a lost art. The problem is not one of illiteracy, but aliteracy. Students learn how to read but do not read to develop their abilities beyond minimum levels of competency.⁵³ Reading tests scores of students from primary to college level confirm this fact. There has been a consistent decline in the ability of students to read and comprehend the material read. Students, at all levels, appear to be less able to use the verbal reasoning and analytical skills necessary in comprehending abstract reading material and ideas.⁵⁴

Reading, and the ability to reflect on the material read, is a key ingredient that law schools assume students have mastered during the schooling process that sweeps them along from primary school to the law school classroom. What is actually happening is less than what is assumed. Certainly students literally learn how to read, but the kind of reading necessary to develop the ability to think abstractly—like a lawyer—is more than a mechanical process.

Meaningful reading requires comprehension. This is the ability to understand the relationship between symbols (words) and the objects they represent and manipulate the symbols in ways that reflect the

53. See *id.* at 22-23.

54. See generally *id.* at ch. 1.

relationship between objects. We literally think through and experience the world through language. This level of comprehension and reading skill is inconsistent with the passive type of reading that frequently exists at every level of schooling. Comprehension is simply not achieved by students coming to class and sitting still for extended periods of time waiting for meaning to spring forth from the text, fully developed, and implant itself into their minds. Instead, they must actively construct meaning by understanding how the symbols (words) can be used to represent, manipulate and recreate the world around them.⁵⁵

One sign of a de-emphasis upon the kind of reading necessary to develop abstract/analytical thinking, is the change in textbooks used in schools and colleges. Books are now more "readable," which amounts to nothing more than reducing the complexity of the ideas conveyed and sentence structure used to express the ideas.⁵⁶ In this regard, one can see the schooling continuum running from primary school to law school, through the texts used in the classrooms. Anthony D'Amato notes how casebooks in law school have, over the years, become easier.⁵⁷ Older casebooks were a collection of cases with little guidance as to how the cases relate to each other. Now, however, the casebooks include highly edited cases and notes designed to lead the students to a particular answer. In D'Amato's view, the old casebooks accurately reflected the kind of thinking lawyers actually do. It is the lawyer that does the intellectual editing necessary to harmonize the concepts, rules and facts in the cases.⁵⁸

D'Amato's insight is correct as far as it goes. The point missed though, is that this process began long before students entered law school. College texts and casebooks allow the student to be a passive recipient of information, rather than an active creator of meaning. To be sure, someone may understand the concepts and be able to engage

55. See generally *id.* at ch. 13.

56. *Id.* at 36-37. See generally LASCH, *supra* note 20, at 245 ("Under cover of enlightened ideologies, teachers (like parents) have followed the line of least resistance, hoping to pacify their students and to sweeten the time they have to spend in school by making the experience as painless as possible. Hoping to avoid confrontations, and quarrels, they leave students without guidance, meanwhile treating them as if they are incapable of serious exertion").

57. D'Amato, *supra* note 9, at 485.

58. A practicing attorney will never find an edited group of cases that illustrates a precise rule of law. *Id.* at 485. Instead, "some cases will be on point and others off point, either confirming a rule or disconfirming it, distinguishing each other or failing to recognize contrary precedent." *Id.* What the practicing attorney does is precisely what casebooks do for students. He must file and sort the cases according to their decisional rules, their facts, their procedural history, and what the parties are attempting to achieve. *Id.*

in the analytical reasoning so highly prized, but it is not the student. It is, however, the expert editor of the casebooks and college texts who is doing the intellectual "heavy lifting." The process of constructing meaning and developing analytical ability is reserved for the expert, not the student.⁵⁹

In this context, the "Socratic mini-lecture"⁶⁰ acquires new meaning. Rather than being a process involving students and a teacher learning from and stimulating each other, it tends to be a series of lectures by the professor on material covered in the casebook. These lectures are combined with casebooks that already reduce or eliminate much of the intellectual editing that should be done by the students. What is left, is a scripted dialogue in which there are pauses for the student to provide the right answer to which they have been steered by both the lecture and the casebook.⁶¹ This reduces learning to information gathering, memorizing facts and testing the ability to repeat, in a slightly different context, what the student read the night or minutes before class.

This process helps to explain the "Wheel of Fortune" approach to learning.⁶² The student's research task was not given along with assigned reading in a text complete with notes and questions. It was not "cases and materials" on a particular issue. It was simply "raw material" that required close insightful reading, reflection, analysis and editing. All of these skills were, if not completely missing from the student's previous educational experience, certainly de-emphasized to the point where unmediated exposure to "raw material" was a

59. See generally HARRY BRAVERMAN, *LABOR AND CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974) (modern education facilitates the process of separating out of work intellectual activity that was formerly part of an integrated whole of conception and execution); GERZON, *supra* note 4 (most Americans are rendered powerless in controlling and understanding their lives because the technological revolution has tended to change what was formerly widely distributed knowledge, into small specialize units possessed and exercised by experts); LASCH, *supra* note 20, at 225 ("Modern society has achieved unprecedented rates of formal literacy, but at the same time it has produced new forms of illiteracy. People increasingly find themselves unable to use language with ease and precision, to . . . make logical deductions, to understand any but the most rudimentary written texts The conversion of popular traditions of self reliance into esoteric knowledge administered by experts encourages a belief that ordinary competence in almost any field . . . lies beyond reach of the layman. Standards of teaching decline, the victims of poor teaching come to share the expert's low opinion of their capacities, and the teaching profession complains of unteachable students.").

60. See *supra* note 3.

61. See D'Amato, *supra* note 9, at 466-67 (in using the Socratic method the answer should not be implicit in, or deductively derivable from, the question. Instead the question should serve as the basis for the student to examine his way of thinking about a problem).

62. See *supra* note 5 and accompanying text.

source of consternation. So, the student resorted to what he knew best: relying upon someone to give clues.

Moreover, the difficulty students experienced in presenting a coherent written statement of issues and their analysis was not peculiar to my practice experience. One of the more salient trends observed by educators from kindergarten to college is the inability of students to comprehend logical relationships, make inferences, and draw conclusions. Difficulty in understanding text and expressing that understanding in writing is symptomatic of a deeper problem in linking thoughts together meaningfully.⁶³ My effort at addressing these writing difficulties by having students verbally explain what they could not delineate in writing simply missed the mark.

C. THE MACCRATE REPORT

Many of the observations concerning the deficiencies in students' analytical abilities are subject to the very criticism noted earlier: thinking like a lawyer has different meanings. Intelligence comes in many forms and perhaps what we are seeing in law school is a move away from the exclusive reliance upon abstract/analytical intelligence, in favor of other types of intelligence. One example would be intra/inter-personal intelligence.⁶⁴ Arguably, the MacCrate Report endorses this perspective when it asserts that law students ought to develop skills such as problem solving, communication, counseling, and negotiation⁶⁵ which will enable them to recognize the desires and perspectives of their clients. Representing a client is seen as an ongoing dialogue in which both the attorney and the client clarify their respective views of the problem and possible solutions. This view of lawyering is expansive and emphasizes abilities not traditionally associated with abstract/analytical thinking.⁶⁶ The Report, therefore,

63. HEALY, *supra* note 47, at 227.

64. *See supra* note 29 and accompanying text.

65. MACCRATE REPORT, *supra* note 9, at 138-39.

66. The heart of the Report is an enumeration of skills and values which are essential for the practice of law. *See* MACCRATE REPORT, *supra* note 9, at 138-41. However, a lawyer does not use these skills in an autonomous and authoritarian fashion that requires the client to passively accept solutions offered by an omniscient professional. *See generally* SCHON, REFLECTIVE PRACTITIONER, *supra* note 37, ch. 1. Instead, the Report is very specific in pointing out that a lawyer must understand how the client sees the problem and defines solutions. Problem solving skills are not merely the ability of a lawyer to define what he thinks the issues and solutions are. A lawyer must ascertain how the client defines the problem and the interpersonal framework in which the problem is set. *Id.* at 142. Moreover, effective communication with the client requires that a lawyer must be aware of the "views, situation, problems, and issues from the perspective

places a great deal of emphasis upon the need for more legal clinics and courses in lawyering skills.⁶⁷

Even though the skills developed in these courses and clinics are recognized as important, and may be manifestations of different types of intelligences, relatively few students take these courses. Most students continue to spend a great deal of time in traditional nonskills courses.⁶⁸ It should also be remembered that the Report did not abandon the commonly accepted association made between thinking like a lawyer and analytical thinking. This skill "reflects the prevailing conception of legal analysis as a means of reasoning from existing law and applying rules and principles established in prior judicial decisions (as well as other sources of law) to a new factual situation."⁶⁹ Legal analysis remains an indispensable tool which students must develop.

While the Report may endorse an enhanced view of legal education and how a lawyer thinks, it still tacitly accepts many of the existing assumptions that surround legal education. For better or worse, law schools continue to focus primarily, though not exclusively, on one type of intelligence. Most of the courses currently taken and offered underscore this fact. Moreover, the Report assumes that students arrive at law school with the skills and training necessary to function in this environment.

This assumption can be seen when one examines the Report's identification of the key problems facing law schools and its proposed solutions. In addressing these issues, the Report does not give any meaningful consideration of the previous educational experiences of

of the [client]." *Id.* 173. It also requires that a lawyer "anticipate the concerns, assumptions, expectations, and objectives of [a client] in a given situation . . ." *Id.*

These skills obviously involve the use of interpersonal intelligence. *See supra* note 29 and accompanying text. The lawyer and client must understand the strengths and weaknesses of each other's perspective. Equally as clear, is that the Report's advocacy for developing these skills is not based upon an original insight. Practicing lawyers have always recognized the need for these skills. *See supra* note 42 and accompanying text.

67. *See generally* MACCRATE REPORT, *supra* note 9, at ch. 7. Given the Report's emphasis upon interpersonal skills it should come as no surprise that it also stresses the need for more legal clinics and skills courses. This type of training approximates the apprenticeship model with its emphasis on contextualized learning enmeshed in a social relationship with the master/teacher. The student is able to identify particular skills in specific settings and witness the direct relationship between using the skill and producing a socially and professionally desirable result. *See supra* notes 32-34 and accompanying text.

68. MACCRATE REPORT, *supra* note 9, at 239-41.

69. *Id.* at 156. The Report also noted a tendency to define skills instruction as involving skills other than legal analysis and research. However, appellate case analysis remains an essential skill which should not be de-emphasized. *Id.* at 234.

students and the affect this previous training may have on the Report's identification of problems and enumeration of solutions. The primary focus is on the inadequacy of current law school curricula. Part of the proposed solution is to offer more training in law schools. In other words, the process of educating lawyers, the educational continuum, appears to begin in law school and extends prospectively into practice.⁷⁰ The continuum does not extend backward into college, high school and primary school. Thus, the Report, even in emphasizing what could be viewed as alternative forms of intelligences or thinking like a lawyer, ultimately assumes this intelligence suddenly appears in law school and students arrive at law school adequately prepared to begin the training necessary to fully develop this intelligence.

However, the Report is not totally silent on the issue of student training prior to law school. Unfortunately, when the issue is acknowledged, it is done so in a superficial manner. Whether a student is prepared for law school through prior training is left to the student to decide. It is his responsibility to assess his fitness by making "judgements regarding personal strengths, priorities, and other aptitudes."⁷¹ Students, however, can make that determination once they are fully informed of the requirements for the practice of law and the kind of preparation necessary to reach that goal. With this information they will no longer be passive consumers of legal education.⁷²

As informed consumers they, presumably, will be able to assess the adequacy of their preparation and what they should expect—demand—from law schools. At best this is an overly sanguine view of the power of consumerism to transform ill-trained law students into aggressive consumers capable of making intelligent assessments of the quality of their previous training. Students are passive consumers at every level of education from primary school through law school.⁷³

70. See *id.* at 3-8.

71. *Id.* at 225.

72. *Id.* at 127. A detailed definition of a passive consumer is not provided in the Report. Instead, the Report simply describes an attribute of a passive consumer of education. Passive consumers assume "that the law school experience adequately prepares them for practice." *Id.* at 228.

73. The evidence strongly suggests that students are passive consumers throughout the educational process. Consumerism is more than simply students not knowing what to expect or demand from an educational institution or assuming that the educational process will prepare one for a particular occupation. See *supra* note 72. Consumerism in education de-emphasizes the development of students' critical thinking ability. Critical thinking becomes an activity engaged in by fewer and fewer students and educators. What students learn is how to negotiate their way through the system by passing tests that do not necessarily reflect anything other than

Providing information to student consumers, trained for intellectual passivity, does not create overnight an informed and aggressive student consumer/learner. It does, however, relieve law schools of the responsibility of systematically examining the effects of student consumerism on the ability of entering students to assess their fitness for law school study and their likelihood for succeeding in law school. In effect, the MacCrate Report addresses the sixteen or so years of previous educational training that produces the problem of student consumerism, by assuming that with the right information, students, for the first time, can make the right choices. Even more disheartening is the failure of law schools and the Report to explicitly recognize the problem posed by inadequate training and student consumerism leads to law schools experiencing the effects of this phenomenon without fully understanding its source.

When students enter law school as fully developed passive consumers of education, they are predisposed to accept, in fact, demand the type of education that nurtures this predisposition. The demand is made for inculcating a comprehensive knowledge of various rules existing in narrow specialized areas. What is not demanded, and may even be met with hostility, is the effort to develop analytical skills. That is, developing the ability to analyze "difficult or complex opinions and constructing arguments or interpretations that are relevant to the lawyer's primary task of resolving problematic issues."⁷⁴ The latter approach focuses on developing the student's ability to master, not simply the legal language, but the mental categories and techniques that structure the language.⁷⁵ Law schools are, therefore, placed in a position similar to colleges and even primary schools. Emphasis is not placed upon understanding and developing the intellectual discipline necessary to organizing and reorganizing patterns of thinking.

the ability to take and pass the test. *See generally supra* note 59; GARDNER, UNSCHOOLED MIND *supra* note 8, at 186-89; HEALY, ENDANGERED MINDS, *supra* note 47, at 26-36; SYKES, *supra* note 21, at ch.5. Consumerism focuses on what students want as opposed to developing the ability to reflect upon the origin, nature of, and the need to be selective in pursuing these wants. The value of learning in this environment tends to be assessed according to how it makes the students feel. *See* D'Amato, *supra* note 9, at 462; Kissam, *supra* note 9, at 276-77.

74. Kissam, *supra* note 9, at 266.

75. Chase, *supra* note 9, at 344. Chase argues that this view of legal training was copied from medical training with its emphasis upon clinical practice. Accurate description of clinical phenomena served a useful purpose in understanding the phenomena itself and teaching medicine. *Id.*

Instead, law schools augment the store of discrete bits of information that are not organized into useful problem solving patterns.⁷⁶

Given the predisposition of students and the response of law schools, passive consumerism will prevail. If a student receives a college education which is touted as developing critical thinking skills, but does not, there is little reason for him to believe that he is not prepared for a law school, which also touts itself as requiring and honing analytical ability. When these students enroll in law school, the pressure builds for the curriculum to suit the kind of "thinking" and "learning" to which these students have become accustomed. The curriculum and teaching will tend to shrink to fit the student rather than encouraging students to grow to meet the intellectual demands engendered by the curriculum.

This is not meant to suggest that the MacCrate Report or law schools are responsible for the problem. It does, however, underscore the existence of unexamined assumptions which need to be addressed explicitly—at least as explicitly as the MacCrate Report examines the issue of skills training in law school. It is assumed that law schools sit atop the learning pyramid, accepting students who have acquired basic skills in primary schools, which are later honed in specialized areas of knowledge in secondary and post secondary schools. The evidence suggests otherwise. It is time to explicitly acknowledge that law schools occupy one spot on the educational continuum and are as influenced by what occurs in high school classrooms as they are by how Contracts I is taught.

The MacCrate Report is valuable in its focus on the need to create programs that develop skills reflective of other forms of intelligence that are necessary for the practice of law. Yet, the Report fails to appreciate the degree to which legal education is part of a larger educational continuum which is embedded in and influenced by the society which created these institutions. Thus, thinking like a lawyer will reflect, at any given time, how students are trained to think based upon what type of thought is considered socially useful. This process begins in kindergarten, not in law school.

76. This approach to learning did not begin in law school. Educators are finding that students, during the earlier stages of their educational careers, are taught to memorize bits of information without receiving much training in how to organize and reorganize their patterns of thinking. Thus, learning is associated with the ability to recall bits of information in a particular order or sequence. However, why the order or sequence exists or how it could be altered is not emphasized. See HEALY, *supra* note 47, at 227-28, 247-49, 311-13.

D. ACCEPTING DIVERSITY IN THE BAR AS A SOLUTION

It is possible to acknowledge that law professors are prisoners of their students' previous training and still argue that law schools can effectively operate in the presumed educationally autonomous world of the university campus. This is because not all lawyers are alike in their abilities, interests, and prior educational experiences. Alfred Reed recognized this point in rejecting the notion of a unitary Bar. In his view, law schools should acknowledge what actually exists. The bar is divided along functional lines based upon differences between clients served and the skills needed to render those services.⁷⁷ What is needed is an acknowledgement that whatever may have been the strengths or weaknesses of lawyers in the past, high level analytical skills are presently in short supply in law schools. Given the current state of the educational system and its affect on law schools, a law school ought to recognize these facts and tailor its curriculum to meet this challenge, as well as the diversity that exists in the practicing bar.

W. Scott Van Alstyne's critique of law schools⁷⁸ could be read as offering a solution to these issues. He argues that law schools need to revamp their curricula to reflect the stratification that exists in the practicing bar. Many legal services are repetitive and require little legal analytical ability. It is suggested that law schools ought to recognize this fact and train lawyers to render specific and limited services that will vary according to the level of intellectual complexity and/or skills employed.⁷⁹

Van Alstyne offers his proposal in response to the commonly held belief that there is a glut of lawyers. In his view, there is no surfeit, but there are too many lawyers trained to provide only a narrow range of services. The knowledge explosion and the growth of government regulation fueled the demand for legal services involving varying degrees of intellectual complexity and skill. Law schools ought to recognize this and institute curriculum reform aimed at training students to provide these services.⁸⁰ While this critique is driven by a belief in an increasing demand for individuals trained in the law, it dovetails nicely with the prevailing trend in both legal and nonlegal education.

77. See REED, *supra* note 9, at 414-20; see also *supra* notes 41-45 and accompanying text.

78. VAN ALSTYNE ET AL., *supra* note 2.

79. See generally *id.* at pt. II.

80. *Id.* at 48-61, 82-87.

The limited specialist exercising narrow technical skills⁸¹ is the natural extension of the student whose early education focused on acquiring basic skills and knowledge without developing the ability to integrate these skills and knowledge into a coherent understanding of a subject area.⁸² This student then graduates to legal education with its increasing emphasis on rule knowledge which places a premium on memorizing comprehensive lists of rules in specialized areas.⁸³ After law school, the student is ready to enter a practice niche providing limited services to a narrow range of clients. Clearly, Van Alstyne did not offer his explication to illuminate the problems and consequences of changes in the educational system outside of law school. However, his analysis is still valuable because it provides, admittedly for different reasons than those offered here, a view of how law schools and the legal profession will appear after they reconcile themselves with the previous educational training of students. Though he sees changes occurring in response to the increased demand for legal services rather than changes in the educational system, the effect is still the same: the creation of limited specialists.

The critical question is not whether this is the direction in which legal education ought to go, rather it is whether there is any choice. Law schools are embedded in and influenced by the educational continuum and do not control its form or its direction. Whether one agrees with the premise upon which Van Alstyne's reforms are built or posits another, such as the need for more training in core skills and values, the fact is that students come to law school not fitting easily into the law school curriculum, with its abstract/analytical orientation. Law schools may be left with very little choice but to accept this fact and tailor their curricula accordingly.

This is not a fatalistic view. It is, however, an open acknowledgment that law schools simply do not stand outside of the society and culture that engender them. The irony here is that one of the major

81. Van Alstyne envisions the limited specialist as possessing both limited technical skills and a limited knowledge base. Many of the services provided by these lawyers would be the same as, or analogous to, the types of services provided by non-lawyers in specialized businesses or service areas. Examples of these services would include real estate brokers, insurance agents, and tax consultants. In his view, the very existence of these non-lawyer professionals is evidence of the public's demand for these services. While these limited lawyer specialists may not receive training as extensive as other types of lawyers, they will still bring a level of competence and sophistication in analytical ability and knowledge that exceeds that of the trained non-lawyer specialist. *Id.* at 123-25.

82. See *supra* note 8.

83. See Kissam, *supra* note 9, at 263-66.

developments in law school has been the incorporation of theories from other disciplines into legal analysis. The law is no longer an island unto itself, but is influenced by other disciplines and institutions.⁸⁴ Notwithstanding this cross-disciplinary influence in the classroom, law schools fail to explicitly acknowledge how much they are being shaped by other educational institutions.

IV. THE PUBLIC PROFESSION VS. THE PUBLIC

Are law schools simply the victims of the prior educational training of entering students? The quick and obvious answer is a resounding yes. After all, law school is law school and law professors cannot be expected to provide the type of primary or post-secondary education that other institutions are charged with providing. Law school professors are then the hapless victims of an educational system that lost its bearings. Professors strive to do the best they can with what they have.

This simple response is appealing but shortsighted. A good measure of the power, prestige and independence accorded the legal profession is engendered by a perception that lawyers perform socially useful functions.⁸⁵ If law schools are training, and the profession accepts, individuals unable or unwilling to perform socially valued functions, it is not too far fetched to envision a time when the power and independence of law schools and the profession are significantly diminished. A better, though less than altruistic, way of conceiving of law schools' and the profession's responsibility, is to realize that if law schools do nothing when the public is demanding something, the public reaction may be negative and result in the loss of what is valued most: power, prestige, and independence. It is, therefore, necessary to

84. See STEVENS, *supra* note 13, at 271-75.

85. See SCHON, *REFLECTIVE PRACTITIONER*, *supra* note 37, at 3-4 ("We conduct society's principal business through professionals specially trained to carry out that business, whether it be making war and defending the nation, educating our children, diagnosing and curing disease, judging and punishing those who violate the law, settling disputes, managing industry and business, designing and constructing buildings, helping those who for one reason or another are unable to fend for themselves."); John E. Sexton, *The Preconditions of Professionalism: Legal Education for the Twenty-First Century*, 52 MONT. L. REV. 331 (1991) (lawyers have been responsible for setting the Nation's values and uniting a diverse population, therefore as professionals they must bear a special responsibility to act as society's conscience); Terrell & Wildman, *supra* note 20, at 422-23 (law is the last remaining cultural phenomenon that unites the nation into a coherent community, thus the legal profession exists to protect and administer this vital form of social cohesion).

explore some of the public's expectations of the legal profession and ask if the profession can meet them.

The public's expectations and the profession's response will be shaped by the confluence of the effects of the trends in education previously discussed. They include the failure of the educational system to develop certain skills in students and law schools being influenced by this fact, though not explicitly acknowledging and analyzing the consequences. Another factor which figures prominently in shaping the public's expectations is the redefinition of what is meant by the assertion that the legal profession is a public profession. This final section will explore what affects this interaction of factors may have upon both the definition of what a public profession is and how the profession will meet the responsibilities imposed by the definition.

A. PUBLIC PROFESSIONAL/PUBLIC INTELLECTUAL

To understand the public's expectations of the profession, it is useful to recall what is meant when law is referred to as a public profession. It is public in two ways. First, lawyers occupy high positions in government and control access to the judicial system. Second, lawyers play a pivotal role in facilitating the redefinition of cultural problems into legal issues.⁸⁶ Now, recall how the present-day student consumer makes his way through the educational system to law school. There is the ever increasing emphasis upon acquiring discrete bits of information instead of developing analytical ability, obtaining answers rather than mastering the process by which answers are obtained, and compiling rules rather than understanding how to integrate and apply rules to new unexpected situations. How does this process affect the public legal profession?

The greatest effect is that at a time when the profession is expected to provide answers to our most pressing problems, it is becoming increasingly ill-equipped to do so. The kinds of questions posed to those trained in the law were formerly addressed by public intellectuals. These were writers and thinkers who addressed an educated public concerning socio/cultural issues of the day. They sought to generate an open, informed and critical discussion of social issues.⁸⁷ It will be difficult for lawyers to fill part of the vacuum left by the

86. See *supra* note 18 and accompanying text.

87. See *supra* note 21 and accompanying text.

disappearance of public intellectuals and still consider themselves professionals. Professionalization leads to a narrowing of perspective into a limited channel of interest and inquiry.⁸⁸ When this is combined with the tendency toward limited rule knowledge approaches to legal education,⁸⁹ the result will be the inability of the profession to provide intellectual leadership on public issues.

One cause of the inability of law schools and the profession to meet these expectations is found in the assumptions that support and justify the universities where most law schools now reside. Modern universities were founded upon positivism, which emphasizes the pursuit of scientific knowledge, not practical learning.⁹⁰ Law schools earned their place in the university community by equating legal studies and research with research in the natural sciences. Studying cases was as exacting, and spawned as much empirical and theoretical knowledge of the real world, as the work of any scientist in a laboratory.⁹¹

The effects of this union between universities and law schools are still with us today, even if one does not believe in the original scientific vision of the study of law. The ideology supporting the growth of universities includes a corollary to the positivist view. This corollary provided that even if pure theoretical knowledge is not being advanced there is a place, although a limited one, in the university for instrumental knowledge. Instrumental knowledge does not involve a search for higher order theoretical relationships. It does, however, involve an objective search for solutions to problems that are capable of resolution by discovery of correct empirically verifiable solutions. Scientific theory, when properly applied through specified techniques, could be used to resolve social problems. It is simply a matter of empirical testing to discover whether a particular means produced a particular end.⁹² Thus, there were two sides to the university. There was the search for abstract theoretical truths along with the search for solutions to specific problems. Both sides were subject to the same standardized and value neutral principles of disciplined scientific procedure.

88. JACOBY, *supra* note 20, at 147.

89. See *supra* note 83 and accompanying text.

90. See *supra* notes 37-40 and accompanying text; SCHON, *REFLECTIVE PRACTITIONER*, *supra* note 37, at 34-36.

91. STEVENS, *supra* note 13, at 51-54.

92. See SCHON, *REFLECTIVE PRACTITIONER*, *supra* note 37, at 21-22, 33-34.

Unfortunately, the issues which lawyers address in their capacity as surrogate public intellectuals are not ones subject to rigorous testing and verification. Goals are often vaguely defined and frequently involve the nontechnical process of framing issues so as to clarify and choose from a multitude of ends and various means to achieve these ends.⁹³ An indispensable component of any definition of what lawyers do while they perform their public function will have to be an awareness of the extent to which the unscientific process of issue framing forms the core around which public issues are shaped and examined. This process is governed by all of the unpredictability and nuances found in politics, values and the life experiences of the individual framing the issue.⁹⁴

The kind of education necessary to solve problems in this context is precisely the opposite of what is supported by the ideology of the university law school. Instead of focusing on rule knowledge, the starting point is realizing that lawyers, in their public capacity, will face complex and fluid social situations. Their analysis of a social problem will not necessarily result in fixed answers or conclusions. Analysis in this context is more analogous to insights which must be tested and revised based upon changing perceptions of what the public desires and values or should desire and value.⁹⁵ And, the information acquired and conclusions reached during this process are subject to challenge and are not always empirically verifiable.

Arguably, this amounts to nothing more than an assertion that lawyers must explicitly acknowledge that the increased reliance upon

93. *Id.* at 38-45.

94. See generally DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS*, ch. 1 (1988). An example of this process can be seen in the analysis of the constitutionality of juvenile curfew ordinances. The issues involved go beyond constitutional rights and focus on emotionally charged and value laden issues concerning the nature and structure of the modern family and the role of the state in regulating family relationships. See *supra* note 18.

95. Donald Schon sees the practitioner's response to problem situations as being artistic in nature. That is, practitioners routinely face issues that cannot be resolved by relying upon traditional answers and problem solving methodologies. Practitioners exhibit an ability to spontaneously respond to problem situations by redefining means or ends that result in a reframing of the problem situation. Moreover, practitioners attempt to solve problems by immersing themselves in problem situations rather than distancing themselves from those situations. They seek both an understanding of the problem and the ability to change it by eliciting new information derived from their involvement. This attempt to immerse oneself in the problem rather than distance oneself in order to achieve a neutral rational perspective is at odds with traditional notions of rationality and scientific knowledge. However, it accurately reflects how practitioners approach problem situations which cannot be resolved by a rigid application of existing knowledge or methodology. See generally SCHON, *REFLECTIVE PRACTITIONER* *supra* note 37, at ch. 5. See also

the legal profession to address all forms of social problems means that members of the profession are moving in the direction of becoming general as opposed to specialized problem solvers. The power and prestige of the profession would not be anchored in the practitioner's ability to master specialized language grounded in abstract theory. Instead, lawyers in the new public profession would derive power from their ability to communicate with the public in a dialogue designed to reach a consensus on the definition of issues and solutions to them.

It is doubtful that law schools could ever fully implement a course of study designed to train lawyers for this public function. There will inevitably develop a tension between university law schools and the demands made by a public looking for leadership and solutions in nonscientific, value and conflict laden areas. It may very well be that the prestige associated with being a member of the research oriented community of university scholars might have to be sacrificed in favor of a heightened sensitivity to the needs and demands of the public. In short, the expectations of the public may require that law schools and the profession undergo a demystification process which reduces the social distance between lawyers and others (both professional and nonprofessional) who are involved in the process of reflecting on and offering solutions to social problems.⁹⁶

Closely related to the problems created by university trained lawyers is the difficulty that arises from the hierarchical division of knowledge embedded in the relationship between universities and practicing professionals. At the pinnacle of the hierarchy is the university law professor pursuing a theoretical understanding and explanation of law without regard to how these principles may or may not translate into practical application.⁹⁷ Practitioners are at the lower end of the hierarchy. They deliver services to clients by applying and manipulating practical rules, derived from general theory.⁹⁸

Goldsmith, *supra* note 10, at 423-24 (the relationship between theory and practice is a "reflective, feedback model in which the predictive powers of particular examples of theoretical knowledge are tested against the experiences and commonsense knowledge of law students and their clients.").

96. See Lopez, *supra* note 3, at 356-57 (the more one champions the notion that lawyering involves a great deal of practical know-how and intellectual skills present in other problem solving professions, such as social work, the more one demystifies what lawyers actually do).

97. See *supra* notes 37-40 and accompanying text.

98. *Id.*

Problems arise when the public imposes demands upon individuals in the hierarchy who are ill-equipped and not expected to respond to these demands because of the assumptions and values that are embedded in the hierarchical arrangement. For example, university law professors are not necessarily equipped nor expected to engage in the unscientific process of resolving social issues through issue framing. Conversely, practitioners involved in the day to day delivery of services to clients may lack the time and ability to address larger issues involving the use or extension of legal theory to new problem areas.

President Clinton's withdrawal of Professor Lani Guinier's nomination as head of the Civil Rights Division of the Attorney General's Office⁹⁹ is a prime example of the tension between the knowledge hierarchy and the demands on the legal profession and law schools. Professor Guinier expressed the view that she hoped "we are not witnessing that dawning of a new intellectual orthodoxy in which thoughtful people can no longer debate provocative ideas without denying the country their talents as public servants."¹⁰⁰ It is significant that the controversy developed out of Professor Guinier's writings which appeared in scholarly legal periodicals, not in literature widely read by the general public. In fact, President Clinton, a lawyer and friend of Guinier's, never read her articles prior to considering her nomination.¹⁰¹ As Mary Ann Glendon pointed out, scholarly journals tend to eschew practical aspects of law in favor of "a zany passion for novelty."¹⁰² These journals do not exist for, nor were they ever intended for, public consumption. They are a private channel of

99. On April 29, 1993 President Clinton nominated Professor Guinier to be Assistant Attorney General in charge of the Justice Department's civil rights division. Professor Guinier, during her tenure as a practicing civil rights lawyer, sued President Clinton while he was governor of Arkansas. This fact apparently favorably impressed the President. It was her experience as a full-time practicing civil rights attorney that lead to the President's decision to nominate her. However, after the nomination, the President came under increasing pressure from conservative senators to withdraw her nomination based upon their perception that her scholarly writings advocated an extreme approach to resolving issues over voting rights. On June 3, 1993 President Clinton withdrew her nomination based upon his belief that Professor Guinier's scholarly writings expressed views on civil rights that he did not support. See R.W. Apple Jr., *President Blames Himself for Furor Over Nominee*, N.Y. TIMES, June 5, 1993, at 1, 8.

100. Neil A. Lewis, *Clinton Tries To Cut Losses After Abandoning A Choice*, N.Y. TIMES, June 5, 1993, at 1, 8.

101. R.W. Apple, *President Blames Himself For Furor Over Nominee*, N.Y. TIMES, June 5, 1993, at 8.

102. Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at Op. Ed. [hereinafter Glendon, *What's Wrong*].

communication between academics who use their own arcane language.¹⁰³

Professor's Guinier's problem was that, when her writings came to the attention of politicians and the general public, there was no one who translated her writings into a language that was accessible to the public. Serving the public requires communication through a shared language derived from open discussion with the public outside the walls of academe. This is generally not present because it is not demanded of the university law professor engaged in the business of "doing science." This is not to suggest that Professor Guinier's or any other professor's writings are never subject to critical debate and review, or that the writings should undergo a critical review process accessible to the general public. The point is that if the legal profession and law schools are expected by the public to fulfill certain roles in addressing public issues, the knowledge hierarchy will come under increasing attack; perhaps for the wrong reasons, but this will not lessen the ferocity of the onslaught.

If law school professors and/or law schools are to play a role in serving the public there will have to be a greater level of respect in academe for solutions to problems derived from debate, bargaining and politics, rather than abstract theory.¹⁰⁴ Absent this kind of process, the country will not be denied, to paraphrase Professor Guinier, the services of thoughtful people. Rather, these thoughtful people will simply continue to remain cloistered until they develop the means and desire to participate in the larger social debate that defines the issues facing the public and its servants.

B. THE PRACTITIONER AS THOUGHTFUL LEADER

It certainly can be argued that Professor Guinier's experiences should not be read too broadly. She represents one end of the knowledge hierarchy, but there is another end. Practitioners may be in a better position than law professors to meet the demands of a public profession. Unfortunately, there is growing evidence that practitioners may not fare any better in meeting the public's expectations.

103. See JACOBY, *supra* note 20, at 7-8; Sykes, *supra* note 21, at 115-22.

104. See Glendon, *What's Wrong*, *supra* note 102.

There is indeed an increased demand for legal services¹⁰⁵ but this does not necessarily reflect a heightened level of involvement by practitioners in addressing social issues. The demand for services reflects the degree to which society is no longer seen as being held together by shared values and common institutions. We now tend to see ourselves as an aggregate of individuals, brought into relation with each other through a system of absolute rights possessed and exercised free from the interference of others.¹⁰⁶

This ideology creates a double pressure on lawyers. First, they are asked to provide leadership in resolving issues which traditionally were thought of as moral and cultural dilemmas, rather than legal issues.¹⁰⁷ Second, when these issues are cast as a clash between rights,¹⁰⁸ lawyers are then called upon to provide access to the machinery of justice which increases the level of divisiveness in society by focusing on resolving discrete disputes instead of addressing underlying societal forces generating the dispute. Reliance upon the legal system, with its rights based orientation, tends to deflect attention away from other forms of nonlegal inquiry and solutions. Thus, practitioners in doing what is most commonly associated with them—providing access to the machinery of justice—are placed in the untenable position of being forced to give the public what it demands, but cannot live with, once it sees the results.

The effects of this pressure can be seen in law schools with their emphasis on, and the student demand for, rule knowledge. Rule knowledge de-emphasizes issues of uncertainty in decision making and value conflict, in favor of providing students with a catalogue of rules in specialized areas of practice.¹⁰⁹ This should not be read as singling out law schools as the cause for the current emphasis on rights. Rather, law schools must be viewed in the social context in which they operate and the current emphasis on rights as the nostrum for social ills will inevitably affect them. However, it would be a mistake to simply posit a direct cause and effect relationship between the emphasis upon rights and law school curricula which emphasize rule

105. The number of J.D. enrollments during 1965-66 was 56,510. By 1991-92 that figure rose to 129,580. Over roughly that same period, the practice of law grew as a service activity estimated at \$4.2 billion-a-year to an estimated \$91 billion. See MACCRATE REPORT, *supra* note 9, at 13-18.

106. See generally *supra* note 18; GLENDON, RIGHTS TALK, *supra* note 18, at 14-15.

107. See *supra* note 18 and accompanying text.

108. *Id.*; see GLENDON, RIGHTS TALK, *supra* note 18, at 101-04.

109. See *supra* notes 30-32.

knowledge. There is a deeper current running under the demand for rights and the relationship between the effect of this demand on the legal profession and educational system.

An educational system that emphasizes the mechanical ability to read words, as opposed to developing a deeper appreciation and comprehension of the meaning of a story, produces students who lack a deep sense of cultural meanings and values.¹¹⁰ This then produces the college student who certainly can read, but may not have fully developed the ability to probe the meaning of a complicated piece of literature or political writing. Then, there is the law student. Having gone through this process he grows accustomed to it and demands training consistent with past educational experiences. These experiences increasingly tend to constrain his ability to understand material presented in the classroom as well as the world around him.

The current rights explosion, and the role that lawyers play in facilitating it as a public profession, acquires new meaning when viewed against this backdrop. An insistence on absolute rights begins where deliberation, reason and understanding ends.¹¹¹ A demand for absolute rights and leadership from the legal profession in achieving this end is a bit like a demand for absolute or correct answers and meaning from literature. You certainly can believe they exist and find them, but you lose much more in the process of the search. It is the internal dialogue between the reader and writer, the sharing and

110. See HEALY, *supra* note 47, at 247-49.

111. The insistence upon absolute and simple answers to complex problems can be seen in many contexts. In the legal sphere it tends to degenerate into absolute formulations of rights. That is, everyone has a right to do virtually anything he wants. Such desires are patently inconsistent with any notion of a ordered and vital, as opposed to self destructive, society. See GLENDON, RIGHTS TALK, *supra* note 18, at 44-45. The insistence upon what one wants at any given moment is caused, in part, by an erosion in the ability to use language as a means for exercising self control. Language and the ability to comprehend the meanings expressed through words is a means by which behavior is controlled and reflected upon. At its simplest level it enables us to generalize from a present desire and reflect on the ramifications of that desire and how it may or may not be consistent with other desires and the interests of others. This ability is what Dr. Healy refers to as "inner speech." See HEALY, *supra* note 47, at 177-90. Dr. Healy focuses her attention on how children appear less able to develop and use inner speech and, therefore, appear less able to control and reflect upon their behavior. However, one cannot avoid noticing the parallel between the weakening of inner speech which controls individual behavior and the absence of meaningful public discourse which might have the same effect on limiting the demands made on the law. Both appear to be rooted in the diminution of the ability to develop and use language that expresses meanings beyond immediate desires. See also WENDY KAMINER, I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS (1992) (self-help movement reflects a general cultural trend towards assessing political issues by how they make one feel, which de-emphasizes issues of self-control and responsibility for one's actions).

explication of meaning that is just as, if not more, important than the answer. As with the skill of meaningful reading, the debate over pressing social issues sometimes requires quiet places for reflection and informed discussion. The reduced concern for developing and nurturing this skill in students is part and parcel of a cultural climate that places a premium on correct answers rather than the slow disciplined process of inquiry, reflection and restraint.

V. CONCLUSION

It seems fitting to end where I began: personal experience. As with every other person who finds himself at a social gathering with strangers, I have been asked: what do you do? What you do is what you are! When I first entered teaching my response was that "I'm a teacher." However, I now say I am a law professor. The "I'm a teacher" response, in most instances, lead the questioner to assume that I was a grade school teacher. When I explained that I taught in law school there was generally the response of "OH! is that right?" The rising tone of voice while the words were uttered clearly indicated I was being accorded additional status because I was not a teacher, I was a law professor.

It is not simply law schools that fail to see themselves as part of the educational continuum, but the public as well. It is unfortunate that what I do in the classroom continues to be perceived as somehow different and/or independent of what other teachers do in schools across the country. However, attempting to develop a student's ability to engage in a slow, careful and reflective reading of a case is an endeavor that binds law professors to other "teachers" far removed from the university environment. The habits of mind and conduct that facilitate this process do not begin in law school. Moreover, the student who leaves law school to practice will not suddenly develop these abilities unless exposed to them early on in his educational career.

More likely than not, there will be other reports such as the MacCrate Report. However, any report or demand for curriculum reform that fails to explicitly acknowledge and accommodate deficiencies in our educational system is bound to serve as merely the foundation for yet another report pointing to yet another problem discovered in law schools and the profession. Until law schools take a candid look at the entire educational continuum and realize there is only one continuum that places students in Contracts I on the first day of class, there

will continue to be considerable hand wringing but few viable solutions.

This assessment will not be an easy process. It may require that law professors and administrators confess to admitting and retaining students whom they believe do not, perhaps cannot, “think like lawyers.” Admittedly this level of candor may be tantamount to suicide—if a law school is not training students to think like lawyers then why should it even exist? However, there is no compelling reason why the current level of skepticism about whether and what students are learning in grade school and high school, should not also be unleashed on law schools.

So, after seven years of being a law professor, it is clear that I am simply a “law teacher.” I am part of an educational continuum that extends far beyond the front door of the law school building. That continuum not only affects what I and other teachers do, but also the demands that will be made upon students after they leave the classroom.

